Vermont Bar Examination
July, 2010
Model Answer 3

Question 1: *Is Theresa's will valid? Discuss.*

To make a will, a person must be at least 18 years old and of sound mind. Theresa was over 18 years old and there is nothing in the fact pattern to indicate she was not of sound mind. *See* 14 V.S.A. § 1. The will is written and signed by Theresa, the testator. *See* 14 V.S.A. § 5. The issue here is the witnesses. In 2002, Vermont law required three witnesses. Theresa has three witnesses, one of whom was Nancy, who is also a non-heir beneficiary under the will. Under Vermont law, such a person may still attest as a witness, but any devise, legacy or interest shall be void to that person. *See* 14 V.S.A. § 10. Thus, the will is valid, but the devise to Nancy may fail.

Question 2: *Assuming the will is valid, set forth and explain the likely distribution of assets under Theresa's will. As part of your discussion, identify the possible claimants and analyze the strengths and weaknesses of their claims.*

The possible beneficiaries under Theresa's will are:
Sam, Adam, Brad, Isabel, Debby or Debby's Estate, Cindy, and Nancy.

Nancy: Nancy is entitled only to a claim on the heirloom ring. She could argue that since current Vermont law requires a minimum of two credible witnesses, and Theresa had two other people witness the execution of her will, that under current Vermont law, Theresa's will should be deemed valid with those other witnesses only. And, thus, Nancy's devise should not be void. However, 14 V.S.A. § 10 states that "such devise, legacy, or interest shall be void . . . unless there are *three* other competent witnesses to such will." Therefore, Nancy's claim is questionable.

Sam: Sam is identified in his mother's will. Since Theresa's will indicated beneficiaries other than Nancy were to take in equal shares, Sam is entitled to an equal share of his mother's estate with all other beneficiaries except Nancy. That estate may or may not include the ring. If the estate does include the ring (i.e., Nancy's claim fails), he shares in it equally with the other claimants. It is highly likely his claim will succeed

Adam and Brad: Adam and Brad are identified in the will and entitled to an equal share in the estate (whether or not that includes the ring) with all other recognized claimants, other than Nancy. It is highly likely their claim will succeed.

Isabel: Isabel is not specifically named in Theresa's will, but she, too, is Sam's child, and was born after the will was executed, so her omission from the will was not intentional. The fact that Theresa died shortly after Isabel was born, without a practical opportunity to remake her will, further supports Isabel's position. However, Isabel's claim is uncertain. She does not fall within the precise terms of either 14 V.S.A. § 332 or 333 (for afterborn and omitted heirs), because she is neither Theresa's child, nor the descendant of a deceased child (Sam is still alive). Nonetheless, Isabel may successfully contend that Theresa intended her estate to pass to all her descendants and that she should be included in the phrase "Sam's children." The fact that Isabel's parents were not married is irrelevant. *See generally* 14 V.S.A. § 315 (person is child of his or her parents, without regard to marital status). Sam has properly acknowledged his paternity.

Debby or Debby's Estate: Debby was clearly identified in her mother's will. However, both she and Theresa were killed together in the car accident and the fact pattern implies that Debby and Theresa died simultaneously. In any event, under 14 V.S.A. § 337, "Except as provided in the decedent's will, an individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of . . . taking under decedent's will, and the decedent's heirs and beneficiaries shall be determined accordingly." Theresa had no provision addressing this fact scenario; therefore, § 337 applies. Since it is clear Debby did not survive Theresa by 120 hours, Debby is considered to have predeceased Theresa. Thus, neither Debby nor Debby's estate has a claim under Theresa's will. Given § 337, any claim made on Debby's behalf is likely to fail.

Cindy: Cindy has an equal claim with other recognized claimants to Theresa's estate (which may or may not include the heirloom ring). She might not take her mother's share, since Theresa required a disposition "in equal shares," but she has a strong argument for taking Debby's share under 14 V.S.A. § 335, the anti-lapse statute. That statute provides: "[w]hen a testamentary gift is made to a child . . . and the designated beneficiary dies before the testator, leaving one or more descendants who survive the testator, such descendants shall take the gift . . . unless a different disposition is required by the will." The question that the court would decide is whether Theresa's intent that her beneficiaries take "in equal shares" is a "different disposition" that overrides the anti-lapse statute.

Likely distribution of assets. It is likely Nancy will not receive Theresa's heirloom ring. Therefore, it will be added to the pool of assets to be distributed to the other beneficiaries. Isabel's claim is likely to be successful. Sam, Adam, Brad, and Isabel will likely each take a one-sixth share, and Cindy will likely take a one-third share of Theresa's estate "after the payment of all just debts and expenses of administration . . ." 14 V.S.A. § 116.

Question 3: *How should Nancy respond to Sam's request? Discuss.*

Nancy should grant the request. A trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries. In other words, a trustee must perform her duties for the benefit of the beneficiaries of the Trust and not to advance her own interests. The fact that the trust gives Nancy "sole discretion" to make certain decisions does not alter Nancy's duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." 14A V.S.A. § 105. It is irrelevant that Nancy does not like Sam. As the trustee for the Trust, she has a fiduciary duty to act in his best interest, and the health and survival of his child is plainly in Sam's best interest. She further has a fiduciary duty to the other beneficiaries, Sam's children, and the Library.

Here, several factors strongly support granting Sam's request based on extraordinary circumstances. First, Isabel's condition is serious and insurance is not available to cover the needed treatment. This is an unexpected and serious circumstance of the type envisioned by the trust's reference to "extraordinary circumstances." Second, there does not appear to be any other source of funds, because Theresa's estate is modest and Sam's financial condition is weak. Third, because Theresa set up the Trust in a manner that would benefit Sam's children after his death, there is a strong inference that Theresa intended to help those children, as well. Fourth, Sam's other children are now adults and, thus, less likely to need the trust to provide for their needs. Fifth, because of Theresa's sudden death, she had no opportunity to confer with the trustee or make any provision for Isabel.

Question 4: *If Nancy refuses Sam's request, how should Sam proceed? Discuss.*

If Nancy was to deny Sam's request under her "sole discretion", Sam should consider several options:

- He could ask the probate division to modify or terminate the trust (that is, require distribution of the trust corpus), with or without the consent of all the beneficiaries. It is possible that Sam's other children would agree to terminate the trust to allow the assets to be used for Isabel, but unclear whether the library could or would consent to that action. Section 412 of the trust code, which allows modification in the event of "unanticipated circumstances," may well apply here. Theresa did not anticipate urgent and substantial medical expenses for her grandchild when she set up the trust. The probate court could modify the trust to allow use of the trust assets for this purpose. Given Theresa's efforts to provide for Sam and his children, it is reasonable to believe that the modification would reflect her "probable intention."

- He could ask the probate division to replace Nancy as the trustee, under 14A V.S.A. § 706. Among other reasons, the court may replace a trustee if the "probate court finds that a change in trustee would be in keeping with the intent of the settler," considering such factors as the relationship between the trustee and the beneficiaries. The court may also remove the trustee for a serious breach of trust, if the trustee is obviously unsuitable, or for other reasons set forth in the statute.

- Sam may bring a claim for breach of fiduciary duty against Nancy. The first two options, however, are likely to achieve his goal more quickly.

Model Answer 4

1. Negligence/Premises Liability Claim

In order to prevail in a premises liability claim against Debra, Paul will have to show that she had a duty to him, that she breached the duty, that the breach was the actual ("but-for") and proximate cause of Paul's injuries, and that Paul suffered damage. Debra may raise the affirmative defense of comparative negligence in response to Paul's claim.

a. Duty

Debra's duty to Paul turns on his status. With respect to a "business invitee," Debra has a duty to take reasonable care to keep the premises in a safe and suitable condition so that invitees are not unnecessarily or unreasonably exposed to danger. Menard v. Lavoie, 174 Vt. 479 (2002); Ball v. Melsur, 161 Vt. 35, 43 (1993). A "business invitee" is someone who is invited to enter or remain on someone else's property for purpose directly or indirectly connected with business dealings between them. Id. As a customer in Debra's store, Paul should qualify as a business invitee.

Debra may argue that Paul cannot pursue a premises liability claim because he was a trespasser, refusing to leave after she asked him to. A trespasser is one who "enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Farnham v. Inland Sea Resort, 2003 VT 23 ¶ 9. The Vermont Supreme Court has not imposed on landowners any duty to protect a trespasser from injury caused by unsafe or dangerous conditions. Id. ¶ 8; Buzzell v. Jones, 151 Vt. 4 (1989).

If Debra succeeds in this argument, Paul will not succeed in his premises liability claim. However, Paul's brief act of overstaying his welcome in Debra's business establishment, after he had climbed up to the second floor as a customer with permission to be there, probably should not transform him into a trespasser. At a minimum, he should be entitled to the opportunity to exit the premises once he was no longer welcome.

b. Breach

Given the narrow tread depth, the loose treads, and the lack of a banister, Paul should be able to demonstrate that the stairs, described as "rickety," were unnecessarily and unreasonably dangerous. Debra could have discovered and repaired these hazards with a reasonable inspection and effort. Given the rickety nature of the stairs, a banister would have been a relatively cheap and effective way of reducing the risk.

The fact that the stair treads did not meet the applicable code standards supports a *prima facie* case of negligence, shifting the burden of production to Debra to provide evidence that the stairs were not unreasonably dangerous. Bazzano v. Killington Country Village, Inc., 175 Vt. 534, 535 (2003); Barber v. Laframboise, 2006 VT 77 ¶ 21; 180 Vt. 150, 162 (2006). Moreover, the local code standards may be

used as *evidence* of the applicable standard of care and breach of that standard. Ball v. Melsur, 161 Vt. at 43-33. (The Vermont Supreme Court has not adopted a rule that holds that violation of a safety code demonstrates "negligence *per se*.")

c. Causation ("But-For" and Proximate) and Damages

Paul will need to demonstrate that Debra's breach was a cause-in-fact of his injuries. That is—he'll need to show that the dangerous treads and lack of a banister caused or contributed to his falling down the stairs. Given that he reached for a banister when he lost his footing, and given that thin and variable treads create a risk of tumbling in the way Paul fell, he should be able to make a case that Debra's breach caused injuries.

Debra's breach was not only an actual cause of Paul's leg injury, but it was a proximate cause, or legal cause, of that injury in that the injuries he suffered from falling down the stairs are foreseeable consequences of unsafe stairs.

The causal connection between Debra's negligence and Paul's blood-borne illness is more challenging. Clearly but-for Paul's fall, he would not have bled, would not have required a transfusion, and would not have contracted the illness. Likewise, Paul will argue that, for the purposes of the proximate-cause analysis, that the need for a transfusion, and the contraction of a disease as a result of that transfusion, were foreseeable consequences of Paul's fall, and thus were proximately caused by Debra's negligence.

Debra may argue that the unsafe blood supply was an intervening cause, severing the causal connection between her breach and Paul's injury. However, the negligence of third parties, including medical negligence, are generally foreseeable, and do not generally rise to the level of intervening causes.

d. Comparative Negligence

Debra will argue that by i) "bounding" down the stairs ii) wearing flip-flops iii) while looking back at her, Paul was himself negligent. Vermont is a modified or partial comparative negligence state, meaning that a factfinder may be asked to apportion the negligence between Paul and Debra if it concludes that both were negligent and contributed to his injuries. If Paul's own responsibility exceeds 50%, he will not be able to recover from Debra. If he is found to be 50% responsible, or less, then the jury will reduce his damages by the proportion representing Paul's share of the responsibility. 12 V.S.A. § 1036.

2. Good Samaritan Law Claim

At common law, with a few exceptions, an individual did not have a duty to render aid to another. Vermont has a Duty to Aid the Endangered Act that provides that a person who knows that someone else is exposed to "grave physical harm," has a duty to give reasonable assistance to that person if he or she can do so without danger or peril to himself or herself, without interference with important duties owed to others, unless the assistance is being provided by others. 12 V.S.A. § 519(a). The statute imposes a $100 fine for violations. The Vermont Supreme Court has never invoked this statute to support an individual civil claim for damages; nor has it rejected the prospect. Paul could argue that the statute creates an independent duty, enforceable in tort, on Debra's part.

As a paramedic on the local rescue squad, Debra was reasonably qualified to provide assistance to Paul beyond dialing 911. Her doing so would not have caused any danger to herself, and would not have interfered with any important duties she owed to others.

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Model Answer 5

1. Transworld has several options that it may pursue to enforce Earth Only's defaulted loan obligation.

First, Transworld may use self-help to take possession of the collateral secured by the security agreement pursuant to T. 9A VSA 9 - 609 of the UCC if it can be done without a breach of the peace. This is the simplest, quickest and most cost effective method for repossession. However, if there is a breach of the peace, the secured party may be liable for damages. Hence, it is also a risky method.

Second, Section 9- 609 also allows the secured party to take possession of the collateral through the judicial process if it cannot gain possession without a breach of the peace. If Transworld utilizes the judicial process, it would need to pursue an action for replevin to obtain possession of the inventory, equipment and stove. While this method is more complicated and can take longer than the self-help method, once Transworld obtains an order from the court, it can use the sheriff's office for assistance in recovering the collateral. Thus, it can be safer and with less risk than self help.

If Transworld takes possession of the collateral through section 9- 609, it is obligated to sell, lease or license the collateral and use the proceeds to pay down the debt. Every aspect of

the sale must be commercially reasonable. If there is a surplus (after taking into consideration the cost of the sale), the surplus must be turned over to Earth Only. If there is a deficiency, Transworld may seek a deficiency judgment against Earth Only

Third, Transworld may pursue an action in strict foreclosure. 9A VSA 9-620. Under the strict foreclosure procedures, Transworld must send a proposal to the Earth Only and any other secured party (which in this case includes Credit Union) in which it states its desire to accept the collateral in full or partial satisfaction of Earth Only's obligation. 9A VSA 9-621. Strict foreclosure would only be available if there were consent of the debtor and no objection raised to the strict foreclosure by entitled to receive notice of the proposal or any other holding an interest in the collateral. 9A VSA 9-620(a). This is the most complicated method and can take the most time. Thus, there is an increased risk that the collateral will be damaged or disappear before it can be repossessed.

Finally, Transworld may bring suit to recover the loan amount without taking possession of the collateral.

2. There are several defenses that can be raised.

Transworld failed to perfect its security in the pellet stove. The pellet stove is considered a fixture because it is attached to the property. A financing statement for fixture must be filed in the land records of the town in which the fixture is located. 9A VSA 9-501(b). In this case, it appears that Transworld only filed the pellet stove financing statement in the secretary of state's office, and not in the town's land record. Accordingly, Credit Union, which did file in the land records, has a superior claim to the pellet stove.

Beyond the pellet stove, it appears that both Transworld and Credit Union have perfected security interests in the remaining collateral. The question then, is who has the superior interest in the collateral. In general, the secured party that perfects their security interest first has the priority. 9a VSA 9-322(a)(1). In this case Transworld's predecessor in interest – Bank – perfected on January 10, 2007 when it filed the financing statement with the secretary of state's office, while Bank filed its financing statement on January 20, 2007. Hence, Transworld's security interest is superior.

Another defense that can be raised by Earth Only against Transworld is that the Bank, who originally made the loan and security interest with Earth Only, breached the agreement to provide Transworld with the additional $75,000 in financing. The first line of inquiry here is whether Transworld is a holder in due course. Transworld is a holder in due course if it took its interest: for value; in good faith and without notice of defect. 9A VSA 3-302. Under the facts presented, it appears that Transworld meets the criteria as a holder in due course. As a holder in due course, Transworld is subject to real defenses but not to personal defenses. 9A VSA 3-305. Given the facts presented, the failure of bank to lend additional money appears to be a personal

defense and as such unavailable to Earth only. Moreover, the facts suggest that Transworld did not know about the Bank's obligation to make the additional loan and of its failure to do so. It is also suggested that Transworld gave value and acquired the loan in good faith.

Finally, although the facts indicate that Earth Only did not sign the financing statement, such is not required. 9 VSA 9-A 502. As such this would not create a valid defense to any party.

3. In order to enforce the obligation, Transworld must establish that is the holder of the promissory note or a non holder in possession of the instrument. T 9A VSA 3-301. This status should be established by documentary evidence including Affidavit of Possession of the instrument.

Model Answer 6

Vermont's long-arm statute, 12 V.S.A. § 855, confers personal jurisdiction to the full extent allowed by the United States Constitution.[1] Under the so-called "*International Shoe* test," the inquiry focuses on whether the defendant has sufficient contacts with Vermont that maintaining the lawsuit here does not offend traditional notions of fair play and substantial justice.[2] The United States Supreme Court has held that the central question in determining whether specific jurisdiction may be exercised is whether the defendant has purposefully availed itself of the privilege of acting in the forum state.[3]

The Vermont Supreme Court has held that when a defendant who is engaged in the business of selling goods regularly advertises those goods in a national market that includes Vermont, personal jurisdiction exists.[4] Thus, in the present case, Hoomba should be subject to personal jurisdiction because it purposefully advertised its product in the Vermont marketplace.

Hoomba might attempt to rely on several factual nuances. One competing fact Hoomba might raise is that the Carters never saw the Hoomba ad themselves. However, the long arm statute and case law focus on the actions of the defendant, so ultimately it should be irrelevant whether the Carters actually did or did not see the advertising in Vermont. Likewise, Hoomba might claim that the purchase in New Hampshire is relevant, but the same analysis would apply to reject this point as well.

1) If Attorney Examinee does file suit against Automation in Vermont, analyze and discuss in which court(s) suit may be filed.

ANSWER

[1] *Northern Sec. Ins. Co. v. Mitec Electronics, Ltd*., 184 Vt. 303, 310 (2008).
[2] *Id.* (quotation of *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) deleted).
[3] *Id.*
[4] See *Dall v. Kaylor*, 163 Vt. 275 (1995).

The Vermont Superior Court, Civil Division would have subject matter jurisdiction over a lawsuit for personal injury suffered by the Carters. Suit would have to be brought in Windsor County because venue lies in the county where one party resides, if either party resides in the state.

There also exists the possibility of bringing suit in U.S. District Court for the District of Vermont based on federal diversity jurisdiction. One requirement is complete diversity of citizenship. This requirement is met because the Carters are residents of Vermont and Hoomba is a resident of Illinois, as it is both headquartered there and it is incorporated there.

A second requirement for federal diversity jurisdiction is that the amount in controversy must exceed $75,000. Each of the Carters would have to individually allege in good-faith that their damages exceed $75,000, so it may be doubtful that the parents damages (mere property damage to their furniture) rise to that level. Additionally, Hoomba may seek to remove at least Clara's claims to federal court.

2) Assuming Mr. & Mrs. Carter sue Automation in Vermont for the damage to their property, analyze and discuss how, procedurally, Automation may assert a statute-of-limitations defense.

ANSWER

A statute of limitations defense is an affirmative defense which is waived under Rule 8 of the Vermont Rules of Civil Procedure if not raised in the defendant's pleadings. Thus, the defense should at a minimum be expressly set forth in Hoomba's answer.

However, another alternative is to file a motion to dismiss under Rule 12(b)(6) prior to filing an answer, as the Vermont Supreme Court has held that a statute of limitations defense is a proper subject for a Rule 12(b)(6) motion. For purposes of the motion, the Defendant would have to accept as true the factual allegations of the complaint. Assuming the complaint accurately recited the facts listed in the question as to the dates and nature of the incident, Mr. & Mrs. Carter's claims against Hoomba should be dismissed in response to such a motion based on the three-year statute of limitations which precludes their claim.

3) If Attorney Examinee does file suit against Automation in Vermont on Clara's behalf, analyze and discuss the significance, if any, of the Illinois jury's "defective design" determination.

ANSWER

The circumstances raise the possible application of issue preclusion, also called collateral estoppel. Issue preclusion bars relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to resolution of the dispute.[5] For preclusion to apply, the issue

[5] *In re Armitage*, 2006 VT 113, ¶ 4.

must meet five conditions: (1) it is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits in the prior action; (4) there was a full and fair opportunity to litigate the issue; and (5) its application is fair.[6]

Here, assuming the Carters' claims are for damages based on defectiveness of the Hoomba, all requirements appear to be satisfied: (1) Hoomba was the defendant in the Illinois case; (2) the defective design of the product was raised as an issue; (3) the Illinois jury made an actual finding of defective design, which finding the Court noted in entering judgment against Hoomba; (4) the question's facts are silent, but we assume that Hoomba had notice of the Illinois lawsuit and participated fully in the defense such that the fourth element is met; and (5) there seems to be nothing suggesting it would be unfair to prevent Hoomba from contesting the defectiveness of the product. However, a point to consider regarding condition (5) is that the question is silent as to the extent of Barry's alleged damages. If his damages were slight, then Hoomba may not have had the same incentive to mount a defense as it might have against a claim by Clara whose damages may be comparatively high, and this condition might weigh against applying preclusion.

Provided that issue preclusion is applicable, the Carters may seek to use preclusion "offensively." In other words, they could possibly seek a ruling from the Court that the matter of product defectiveness is established without the Carters having to prove it in the Vermont suit.

4) Discuss the means by which Attorney Examinee may serve Automation with a complaint if suit is filed in Vermont.

ANSWER

Suit may be initiated in Vermont Superior Court by filing a complaint with the court or by the service of a summons and complaint. The formal requisites for a summons include basic party and court information, notice of the date by which an answer must be filed, and notice that default judgment may be rendered absent filing of a timely answer. When an action is commenced by filing, the summons and complaint must be served upon the defendant within 60 days after the filing of the complaint. When an action is commenced by service, the complaint must be filed with the court within 20 days after the completion of service upon the first defendant served.[7]

Where a corporation does have sufficient minimum contacts for personal jurisdiction, the Vermont "long arm" statute provides that the Vermont secretary of the state may be treated as the corporation's agent for service of process. Thus, one option is to complete service upon Hoomba by having the summons and complaint served upon the secretary of state by a sheriff, constable, or law-appointed person. The plaintiff's attorney must file a return of service with the Court.

[6] *Id.*
[7] V.R.C.P. 3.

Another procedural option is afforded by Rule 4(e), which also provides for service upon a foreign corporation over which there is long-arm jurisdiction in Vermont. The rule states that service may be completed in the same manner as if such service were made within Vermont, or in any manner in which service may be effected under the laws of the state in which the person is served. The Rules of Procedure allow for service upon a domestic or foreign private corporation by delivering a copy of the summons and of the complaint to an officer, a director, a managing or general agent, a superintendent, or to any other agent authorized by appointment or by law to receive service of process. Therefore, personal service in the State of Illinois, delivered by a person authorized under Illinois state law, upon any of these individuals affiliated with Hoomba would constitute valid service of process. An affidavit of the person making service in Illinois must be filed with the court, stating the time, manner, and place of service.

One final procedural option to note is waiver of service. The Rules obligate a defendant, including a foreign corporation subject to long-arm jurisdiction, to avoid the cost to the plaintiff of personal service and to instead waive service by signing a waiver form sent by first class mail to the defendant with the complaint. If waiver is refused, the defendant must reimburse the plaintiff the cost of effectuating personal service.